Oklahoma and Florida for the general proposition that local legislatures *in those jurisdictions* may legislatively alter, amend or modify the powers and duties of their respective Attorneys General.[5] The discussion is premature. Even so, as stated in Petitioner's opening brief, while the local Legislature may once as a matter of local law have been authorized to increase or add to the powers and duties of the Attorney General, to alter, diminish, abridge or modify those powers of an office that it itself had created, given the "constitutional" status of the Office now in the Organic Act, without express authority, the local Legislature is not authorized to alter, abridge, restrict or modify the powers and duties of that Office as established by Congress.

The jurisdiction recommended to Congress by the Compiler of Laws as an example of the kind of Office of Attorney General that should be adopted for Guam is the State of Illinois. In states where the Office of Attorney General is constitutionally established, like Illinois, the Attorney General's powers are regarded as powers that could not be diminished by local legislation. *See, e.g., Lyons v. Ryan*, 201 Ill.2d 529, 381-82, 780 N.E.2d 1098, 1105-06 (Ill. 2002); *People ex rel. Hartigan v. E. & E. Hauling, Inc.*, 607 N.E.2d 165, 170 (Ill. 1992) ("although the legislature may add to the Attorney General's common law powers, it may not detract from them"); *Gust K. Newberg, Inc. v. Illinois State Toll Highway Auth.*, 456 N.E.2d 50, 67 (Ill. 1983) ("while the legislature may add to his powers, it cannot reduce the Attorney General's common law authority in

[5] Even if it was true, and the Attorney General contests this point, it does not matter that "Guam's Legislature, like the legislatures of most states, has expressly empowered certain government agencies, such as GIAA, to retain independent counsel." Opposition at p. 21. What matters is whether the Guam Legislature itself is authorized by Congress under the Organic Act to "prescribe by law" the powers and duties of the Office of Attorney General.

directing the legal affairs of the state"); *Department of Mental Health v. Coty*, 232 N.E.2d 686, 689 (Ill. 1967) ("the common-law powers of the Attorney General were preserved to him by the constitution and while the General Assembly can impose additional power and duties upon him, it cannot strip him of his common-law powers"); *People ex rel. Castle v. Daniels*, 132 N.E.2d 507, 509 (Ill. 1956) ("the Attorney General, whose office is created by the Illinois constitution, ... is the chief law officer of the State and has those powers which resided in the Attorney General at common law.... and neither the legislature nor the courts can deprive him of his constitutionally granted authority"); *American Legion Post No. 279 v. Barrett*, 20 N.E.2d 45, 51 (Ill. 1939) ("the General Assembly may not take away from a constitutional officer the powers or duties given him by the constitution"). Similarly, under the Guam's Organic Act, its "constitution," unless the local Legislature is expressly authorized to "prescribe by law" the powers and duties of the Office of Attorney General, it may not do so.[6]

But discussion of distinguishable case law from incompatible jurisdictions cited by the Respondent is premature. Should this Court grant the Petition for Writ of Certiorari, the question will be whether Congress intended to delegate authority to the Legislature of Guam to alter,

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[6] The Supreme Court of Guam simply failed to comprehend the significance of the Compiler of Law's references to Illinois, and failed to adequately address the simple fact that a legislature must be expressly authorized by its state's constitution to "prescribe by law" the powers and duties of a constitutional officer. A careful analysis of each of the jurisdictions cited by the Respondent reveals that each state's constitution authorized the local legislature to prescribe by law the powers and duties of its Attorney General. That cannot be said of Guam's Organic Act. There is no express delegation of authority to the local Legislature to alter, amend or abridge the powers and duties of this Office created by the Congress, and there is no legal authority endorsed by this Court that permits the courts to imply such authority.

amend, abridge or modify the powers and duties of an Office it created. Congress did not.

CONCLUSION

No mere trifle of local law is at issue here. Guam is not a state and has no inherent sovereignty; "and except as Congress may determine, Guam has no inherent right to govern itself." *Guerrero,* 290 F.3d at 1214. It is therefore a question of substantial federal concern as to what Congress intended for the self-governance of the Territory of Guam. One federal court has already abdicated its unflagging obligation to decide this substantial question of federal law. This Court should grant this Petition and settle a serious and continuing dispute over the interpretation of a Congressional enactment, the Organic Act of Guam.

Respectfully submitted,

ROBERT M. WEINBERG
Assistant Attorney General
Counsel of Record
Guam Attorney General's Office
287 West O'Brien Drive
Hagåtña, Guam 96910 USA
Telephone: (671) 475-3324
Telecopy: (671) 472-2493

Counsel for Petitioner

APPENDIX

MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation
Suite 807, GCIC Building
414 West Soledad Avenue
Hagåtña, Guam 96910

Telephone (671) 472-2089/90
Facsimile (671) 477-5206

April 2, 2003

VIA FACSIMILE ONLY 472-2493

The Honorable Douglas B. Moylan
Attorney General of Guam
Office of the Attorney General
120 West O'Brien Drive
Suite 2-200E, Guam Judicial Center
Hagåtña, Guam 96910

Re: Criminal/Civil Investigations

Dear Mr. Moylan:

This is in response to your letters dated April 1, 2003, wherein you make reference to certain criminal and civil investigations that you wish to conduct involving the past practices of the Guam International Airport Authority during the prior administration. Please be assured that the current Directors and Management of GIAA share your concern over certain actions and expenditures during the prior administration and they welcome your interest in investigating these activities.

After the new administration was sworn into office, the newly-appointed Directors and Executive Manager of

GIAA began an extensive review of the prior financial transactions at the Airport. As a consequence of their diligent work, the current Directors and Executive Manager discovered numerous questionable transactions, including, but not limited to: (1) the Governor statues and Airport Executive Lounge; (2) the Tutujan (Triangle) Park Project; (3) the Guam Employees' Association Generator Sales Project; (4) extensive travel during the last few months of the prior administration; (5) China Link; and (6) failing to follow the procurement laws of Guam. It is the current Directors and Executive Manager who discovered these matters and it is they who have brought them to the attention of the public.

Prior to receipt of your April 1, letters, the Directors and/or Executive Manager of GIAA had already requested that this office review the transactions referred to in your letters. These investigations have already commenced. In the event that GIAA uncovers any civil wrongdoing, GIAA will file the appropriate judicial proceedings against the wrongdoers. In regard to criminal investigations, GIAA will of course cooperate with the United States Attorney and your office to make sure that any violations of the law are properly prosecuted. GIAA has already been in contact with the United States Attorney.

While GIAA and your office have a mutual interest in investigating any wrongdoing, it is undisputed that GIAA and your office are taking adverse positions in certain civil lawsuits. For this reason, GIAA prefers to have communications between GIAA and the Attorney General's Office channeled through this office.

This is consistent with the ethical requirements of our profession which prohibit your office from communicating directly with a party whom you know to be represented by counsel. Inasmuch as our firm represents GIAA in all of its

legal affairs, including those items specified in your April 1, 2003 letters, you are required to communicate with GIAA through our office. This will not result in any delay in any criminal investigation. To the contrary, our firm's familiarity with GIAA and the relevant documents may actually expedite any investigations that you wish to conduct.

There are additional reasons to have communications routed through the offices of GIAA's counsel. It is important for GIAA to preserve any evidence relating to its financial transactions; particularly those that might be the subject of investigations. It is very possible that federal investigators may also wish to review documentation relating to transactions during the prior administration. The preservation of evidence will be facilitated if the exchange of the documents is coordinated through counsel.

GIAA is currently reviewing your request for specific documents relating to the Chinese Terracotta Warrior Exhibit; Birdman Rally; Governor statues and Airport Executive Lounge; Tutujan (Triangle) Park Project; and GIAA Employees' Association Generator Sales Project. We will respond to this request in a timely manner consistent with GIAA's obligations under the law. Please let us know immediately if there is any particular order in which you would like the documents to be produced.

In closing, GIAA looks forward to having a good working relationship with your office regarding the investigations that you wish to conduct. Please have your investigators contact my office regarding any interviews that they may wish to conduct. We look forward to hearing from you.

Best regards,

DAVID A. MAIR

DAM:lbe

cc: Mr. Frank Blas
Mr. William R. Thompson

(3)

NO. 04-1480

Supreme Court, U.S.
FILED
SEP 12 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DOUGLAS B. MOYLAN
Attorney General of Guam,

Petitioner,

v.

A.B. WON PAT GUAM INTERNATIONAL AIRPORT AUTHORITY,
by and through its Board of Directors,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Guam

RESPONDENT'S SUPPLEMENTAL BRIEF

DAVID A. MAIR*
RANDALL TODD THOMPSON
MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation
Attorneys at Law
238 A.F.C. Flores Street
Suite 801, Pacific News Building
Hagåtña, Guam 96910
Telephone: (671) 472-2089/2090

**Counsel of Record for Respondent*

QUESTION PRESENTED

Whether the Supreme Court of Guam erred in holding that the Organic Act's description of the Guam Attorney General as "Chief Legal Officer does not preclude the Guam Legislature from allowing Guam government agencies, such as Respondent GIAA, to retain private counsel.

INTRODUCTION

This brief is being filed pursuant to Supreme Court Rule 15.8, in order to call the Court's attention to a new case, not available at the time Respondent A.B. Won Pat Guam International Airport Authority ("Respondent" or "GIAA") submitted its last filing. Specifically, Respondent wishes to call the Court's attention to the August 16, 2005 Opinion issued by the Ninth Circuit Court of Appeals in the case styled as *Attorney General of Guam v. Jesus Q. Torres*, Nos. 03-15823, 03-15999, Slip. Op.,___ F.3d ___, 2005 U.S. App. LEXIS 17229 (9th Cir. 2005) ("Ninth Circuit Opinion").[1] The Ninth Circuit Opinion affirmed the District Court of Guam's April 1, 2003 dismissal of the Attorney General's federal suit seeking declaratory and injunctive relief concerning the identical controversy which is the subject of the instant Petition for *certiorari*. *See Attorney General of Guam v. William R. Thompson (GIAA Exec. Mgr.)*, D. Guam Civ. Case No. 03-0008 (Order, April 1, 2003). Resp. App. 1.

ANALYSIS

I.

THE NINTH CIRCUIT OPINION IS RELEVANT TO THE PETITION

The Ninth Circuit Opinion is relevant to the pending Petition if for no other reason than because both parties have

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[1] A copy of the Opinion appears in the Appendix to this brief. Respondent notes that the Mandate has not yet issued by the Ninth Circuit, and that Petitioner herein has filed a petition for rehearing and suggestion for rehearing *en banc*.

referred to the underlying District Court decision, as well as the pendency of the Ninth Circuit appeal, in their respective filings in this Court.

Respondent referred to the matter in its brief in opposition under the section labeled "Opinions Below." Respondent observed that the District Court of Guam held in the underlying case that the *Younger* and *Burford* abstention doctrines, as well as the Declaratory Judgment Act, counseled against federal court consideration of the identical issues raised in the case *sub judice*. *Id.* at 1. Respondent expressly noted that, "the appeal remains pending as of the date of this brief." *Id.* Respondent also referred to the District Court's decision, in the margin, in referring to the Petitioner's argument that no Article III court has sat to entertain Petitioner's case. *Id.* at 12, n.8.

Likewise, Petitioner also referred to the lower court decision and the pendency of the appeal. For example, in Petitioner's Reply Brief, he refers to the underlying District Court decision as constituting "reversible error" because, in Petitioner's view, Respondent "was able to persuade a federal district court to abdicate its unflagging obligation to decide properly presented questions of federal law . . . ." *Id.* at 3, n. 1.[2] Petitioner deemed Respondent's reference to the

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[2] The Petitioner continued, "Assuming the Attorney General prevails on appeal, and the Ninth Circuit reverses and remands the District Court of Guam's abstention order, if this Court does not grant *certiorari* and review the decision of the Supreme of Guam, the Respondent will likely invoke the *Rooker-Feldman* doctrine, and res judicata to the effect that this pure question of federal law and Congressional intent in amending the Organic Act of Guam will escape substantive review by any federal court. *Id.*

District Court's decision as "misdirected." *Id.* Petitioner also boldly proclaimed, ". . . [t]hat court was in error to abstain for the same reasons that this case raises an issue of substantial federal concern that is due to be heard by this Court."[3] *Id.*

II.

THE NINTH CIRCUIT OPINION BOLSTERS RESPONDENT'S ASSERTION THAT THE PETITION LACKS MERIT

Respondent respectfully submits that the Ninth Circuit Opinion, affirming the District Court's decision, sets forth a reasoned and well-founded rebuttal to the Petitioner's contention that the instant Petition presents substantial issues of federal concern. In fact, the Ninth Circuit Opinion bolsters Respondent's contention that federal courts, including this Court, have demonstrated "a long-standing 'reluctance to review' decisions of territorial courts interpreting federal statutes of peculiarly local concern." *See Resp. Brief* at 7, *quoting Pernell v. Southall Realty*, 460 U.S. 363, 366-368 (1974).

For example, in affirming the trial court's decision to abstain on grounds of the *Younger* doctrine, the Ninth Circuit relied on authority from the District of Columbia Circuit and the First Circuit in concluding that the courts of Guam are to be treated as "state" courts for purposes of the *Younger* abstention doctrine. App. 13-14. The Ninth Circuit also echoed its earlier precedents recognizing that Congress has specifically required that relations between the federal courts

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[3] A copy of the District Court's decision in the case was made part of the Appendix to Respondent's Brief in Opposition.

and Guam's local courts be the same as those between the federal and state courts. App. 15-16, *citing Guam v. Yang*, 850 F.2d 507, 510 (9th Cir. 1988) (*en banc*) overruled on other grounds by *U.S. v. Keys*, 133 F.3d 1282 (9th Cir. 1998) (*en banc*); *Western Systems, Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992); *EIE Guam Corp. v. Long-Term Credit Bank of Japan, Ltd.*, 322 F.3d 635 (9th Cir. 2003). As the court stated: "Most recently, following the creation of the Guam Supreme Court, we held that we 'apply a deferential standard of review to [the] Guam Supreme Court concerning local law' and also 'must take into account Congress' clear intent to allow the Guam Supreme Court to develop Guam's common law. '" App. 16, *quoting Heuser v. Department of Law*, 368 F.3d 1091, 1097 (9th Cir. 2004).[4] Thus, the Ninth Circuit concluded that the District Court of Guam properly deferred to the proceedings in Guam's courts under the *Younger* abstention doctrine. App. 16. The Ninth Circuit said:

> Prior to the 1998 Amendment to the Guam Organic Act, GIAA was authorized to retain independent counsel. **The District Court action would have interfered with the branches of Guam's government working out the impacts of the 1998 Amendment.** Finally, the District Court's retention of Appellant's case might 'reflect negatively' on Guam's ability to enforce

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[4] It is notable that the Ninth Circuit's Opinion makes reference to the petition for *certiorari* filed in the instant proceedings. *See* App. 13-14, quoting Petitioner's petition for the proposition that the Guam court proceedings provided Petitioner with an adequate remedy for its grievances for purposes of the *Younger* abstention doctrine.

> federal laws. Id. Thus, although we recognize that Guam is not a state, we conclude that Guam's courts may be treated as state courts for the purpose of applying the *Younger* abstention doctrine.

App. 14 (footnote omitted and emphasis added).

CONCLUSION

The Court is asked to consider the Ninth Circuit's August 16, 2005 Opinion affirming dismissal of Petitioner's federal-court action involving the identical controversy raised in the Petition. That decision bolsters Respondent's contention that the Petitioner has failed to set forth adequate grounds justifying the grant of *certiorari* by this Court.

Dated this 9th day of September, 2005.

Respectfully submitted,
DAVID A. MAIR*
RANDALL TODD THOMPSON

* *Counsel of Record for Respondent*

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE ATTORNEY GENERAL OF GUAM,
Plaintiff-Appellant/
Cross-Appellee,

v.

JESUS Q. TORRES, * in his official capacity as Executive Manager of Guam Airport Authority,
Defendant-Appellee/
Cross-Appellee.

Nos. 03-15823
03-15999

D.C. No.
CV-03-00008

OPINION

Appeal from the United States District Court
for the District of Guam
John S. Unpingco, District Judge, Presiding

Argued and Submitted
May 11, 2005—Honolulu, Hawaii

Filed August 16, 2005

Before: Dorothy W. Nelson, Consuelo M. Callahan, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Callahan

*Jesus Q. Torres is substituted for his predecessor, William R. Thompson, as Executive Manager of the Guam Airport Authority. Fed. R. App. P. 43(c)(2).

SUMMARY

Civil Litigation and Procedure/ Jurisdiction — Federal Question

The court of appeals affirmed a judgment of the district court. The court held that Guam's courts may be treated as state courts for the purpose of applying the *Younger* abstention doctrine.

Appellant the Attorney General of Guam filed an action in federal district court in Guam seeking a declaration that, under the 1998 Amendment to the Guam Organic Act, 48 U.S.C. § 1421g(d), his authority as the chief legal officer of Guam preempted prior Guam law and prohibited appellee the Guam International Airport Authority (GIAA) from retaining its own legal counsel to conduct civil litigation. The district court, noting the existence of a parallel action in the Guam superior court, dismissed the action on three separate grounds, including abstention under *Younger v. Harris*, 401 U.S. 37 (1971).

The Attorney General appealed.

[1] Absent extraordinary circumstances, *Younger* abstention is proper when there are ongoing state judicial proceedings; the proceedings implicate important state interests; and the state proceedings provide the plaintiff with an adequate opportunity to raise the federal claims. There was no question that these conditions had been met. **[2]** The relevant question was whether proceedings in Guam's courts could be treated as state judicial proceedings and accordingly, in this case, triggered the application of *Younger* abstention.

[3] The evolution of the *Younger* abstention doctrine has confirmed that it is based on considerations of equity and comity. Another critical concern appears to be whether the local court provides the plaintiff with an adequate opportunity

to litigate his or her federal claims. [4] The D.C. Circuit has determined that the District of Columbia's lack of statehood does not bar the application of *Younger* abstention to proceedings in its local courts, noting that the equitable principles underlying the *Younger* abstention doctrine applied in full measure to the District of Columbia, and concluding that all the comity concerns underlying the doctrine applied with equal force to the District of Columbia. [5] The application of the policies underlying the *Younger* abstention doctrine to Guam produced the same result. First, in light of the pending action in Guam's superior court, maintaining the federal action would have been duplicative. Second, there was no doubt that the local action provided the Attorney General with an adequate remedy. Third, the district court action would have interfered with the branches of Guam's government working out the impacts of the 1998 Amendment. Finally, the district court's retention of the Attorney General's case might reflect negatively on Guam's ability to enforce federal laws. Thus, although Guam is not a state, it had to be concluded that Guam's courts may be treated as state courts for the purpose of applying the *Younger* abstention doctrine. [6] This determination was consistent with the First Circuit's decision implicitly equating Puerto Rico with a "state" for purposes of *Younger* abstention.

[7] As it did for the District of Columbia, Congress has also enacted legislation concerning Guam that supported treating Guam's courts as if they were state courts. [8] The statute provides that the relations between federal courts and Guam's courts should be similar to those between federal and state courts, and abstention appeared to fall within the other matters or proceedings governed by that relationship. [9] Finally, deference to Guam's courts under the *Younger* abstention doctrine was consistent with prior Ninth Circuit cases. The Ninth Circuit has recognized that Congress has specifically required that relations between the federal courts and Guam's local courts be the same as those between the federal and state courts; [10] that the territorial courts in Guam qualify as state

courts for the purpose of 28 U.S.C. § 1441(d); and **[11]** that the court of appeals applies a deferential standard of review to the Guam Supreme Court concerning local law. **[12]** It had to be concluded that the district court properly deferred to the proceedings in Guam's courts under the *Younger* abstention doctrine. The judgment of the district court had to be affirmed.

COUNSEL

Plaintiff-appellant-cross-appellee was represented by Robert M. Weisberg, Assistant Attorney General of Guam, at oral argument, and by Robert M. Weisberg and J. Basil O'Mallan III, Deputy Attorney General of Guam on the briefs, all of Hagatna, Guam.

Defendant-appellee-cross-appellant was represented by Randall Todd Thomspon of Mair, Mair, Spade & Thomspon of Hagatna, Guam.

OPINION

CALLAHAN, Circuit Judge:

The Attorney General of Guam filed this action in the United States District Court of Guam seeking a declaration that, under the 1998 Amendment to the Guam Organic Act, 48 U.S.C. § 1421g(d), his authority as the "Chief Legal Officer" of Guam preempted prior Guam law and prohibited the Guam International Airport Authority ("GIAA") from retaining its own legal counsel to conduct civil litigation. The district court, noting the existence of a parallel action in the Guam superior court, dismissed the action on three separate grounds: abstention under *Younger v. Harris*, 401 U.S. 37 (1971), abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315

(1943), and because the action was unsuitable for relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. We affirm the district court's dismissal of the action as appropriate under *Younger* abstention. We also affirm the district court's dismissal under the Declaratory Judgment Act because appellant waived his challenge to this dismissal.[1]

A. *Background*

On March 3, 2003, appellant filed a complaint in the district court for injunctive and declaratory relief. He alleged that the United States Congress, when it amended the Guam Organic Act in 1998, provided that the Attorney General of Guam "shall be the Chief Legal Officer of the Government of Guam," and that this language preempted prior Guam law and denied GIAA the authority to retain its own legal counsel, instead of appellant, to conduct civil actions.[2]

Prior to the 1998 Amendment, pursuant to 12 GUAM CODE ANN. § 1108 and 5 GUAM CODE ANN. § 30109, GIAA was authorized to retain outside counsel and to use its own legal counsel in civil actions.[3] In 2003, after the current Attorney

[1]As we may affirm the district court on any one of the three separate grounds it advanced for dismissing appellant's action, we need not review the district court's dismissal under *Burford*.

[2]In relevant part, 48 U.S.C. § 1421g(d) reads:

> (1) The Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam. At such time as the Office of the Attorney General of Guam shall next become vacant, the Attorney General of Guam shall be appointed by the Governor of Guam with the advice and consent of the legislature, and shall serve at the pleasure of the Governor of Guam.

[3]12 GUAM CODE ANN. § 1108 provides, in pertinent part:

> (a) The [GIAA] Board may also appoint a treasurer, a controller, and an attorney, all of whom shall serve at the pleasure of the Board. Their duties and compensation shall be fixed by the Board.